Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-505

ROBERT EUGENE BETTA and RAYMOND L. NG,
Petitioners,

vs.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District

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First Appellate District

The petitioners Robert Eugene Betta and Raymond L. Ng respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California for the First Appellate District, affirming the respective judgment of sentence and order granting probation of the Superior Court of the State of California for the City and County of San Francisco, imposed after the petitioners had entered pleas of guilty to keeping and occupying a prem-

ises with horseracing paraphernalia in violation of § 337a, Subd.2 of the California Penal Code.

OPINION BELOW

The Opinion of the Court of Appeal of the State of California for the First Appellate District, certified not to be published in official reports, is set forth as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeal of the State of California for the First Appellate District was entered on March 29, 1973. On April 23, 1973, the petitioners' petition for a rehearing in the said Court was denied. On June 20, 1973 the Supreme Court of the State of California denied the petitioners' Petition for Hearing. This petition for a writ of certiorari will be filed within ninety days of said date. The jurisdiction of this Court is invoked under 28 U.S.C. § 127(3).

STATEMENT OF QUESTIONS PRESENTED

1. Has an individual who is accosted by police officers while leaving an apartment building, told to remain inside, and thereafter taken through the lobby of the apartment house and upstairs, been placed under arrest, as distinct from being detained for investigation, when one of the police officers involved

conceded that had the individual not gone with the officers "voluntarily," the officers would have "insisted" that he go with them?

2. Are two individuals seated inside an apartment house entitled to a reasonable expectation of privacy against a police officer's coming through a tradesmen's entrance at the side of the apartment building, walking down a concrete walkway and up a flight of stairs, and placing his ear nearby the kitchen door, so as to hear telephone and other conversations which occurred in a bedroom separated from the rear door by a kitchen?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved:

1. United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States Constitution, Amendment XIV, §1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Penal Code §1538.5

§ 1538.5. *Motion to return property or suppress evidence*

(a) *Grounds.* A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that:

(1) The search or seizure without a warrant was unreasonable; or

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) *First hearing.* When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) *Evidence.* Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) *Effect of granting motion.* If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless fur-their proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

* * *

(f) *Felony; motion at preliminary hearing.* If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) *Misdemeanor; pre-trial motion at special hearing.* If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

* * *

(i) *Felony; renewal of motion at special hearing; review.* If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to

trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

* * *

(m) *Exclusive pre-trial remedy; review on appeal after conviction.* The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) *Motions on other grounds; existing law and procedure.* Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return prop-

erty, brought on the ground that the property obtained is protected by the free speech and press provisions of the federal and state constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW AND PRESENTATION OF FEDERAL QUESTIONS

The petitioners were charged with three counts of bookmaking in violation of various subdivisions of §337(a) of the California Penal Code in a complaint filed in the Municipal Court of the City and County of San Francisco on April 14, 1971. On June 9, 1971, a preliminary examination was held before the Hon. James J. Welsh in the Municipal Court, after which the petitioners were bound over to the Superior Court and charged in a three-count information with violations of various subdivisions of § 337(a). (C.T. 1)

Before the date set for the preliminary hearing, petitioner Robert Eugene Betta filed a written motion to suppress evidence on the ground that the

search and seizure made at the time of his arrest were without a warrant and were unreasonable in violation of his rights under the Constitution of the State of California and the Fourth and Fourteenth Amendments to the United States Constitution. At the preliminary examination, petitioner Raymond L. Ng joined in the motion of petitioner Betta. Both motions were denied.

In the San Francisco Superior Court, petitioners renewed their motions to suppress evidence under California Penal Code § 1538.5, reasserting that the evidence obtained against them was the result of unlawful arrests without warrants and unlawful and unreasonable searches and seizures without warrants, in violation of their rights under the Constitution of the State of California and the Fourth and Fourteenth Amendments to the United States Constitution. The prosecution submitted its case upon the transcript of the preliminary examination. Thereafter, the defense called both petitioners and certain additional information was submitted by stipulation. On September 7, 1971, the Honorable Robert J. Drewes of the San Francisco Superior Court denied the motions to suppress. (C.T. 4-32, 34)

Thereafter, on the same day, the petitioners entered pleas of guilty to count one of the information before the Hon. Walter F. Calcagno, whereupon the remaining two counts were dismissed. On October 1, 1972, petitioner Betta was sentenced to State prison with the execution of the sentence suspended, and petitioner Betta was placed on three years' probation, on the

condition that he pay probation costs in the amount of $750.00. The imposition of sentence as to petitioner Ng was suspended, and he was placed on probation for a period of two years on the condition that he pay $500.00 as costs, upon payment of which the matter would be deemed to be a misdemeanor under § 17 of the Penal Code. (C.T. 35-37)

On October 4, 1971, petitioners filed their Notices of Appeal to the Court of Appeal of the State of California for the First Appellate District. (C.T. 38) Under § 1538.5(m) of the California Penal Code, an individual may appeal from a judgment of conviction based upon a plea of guilty if at some stage of the proceedings before the entry of the plea the individual has moved to suppress the evidence.

In their opening briefs in the Court of Appeal, petitioners cited and relied upon the decisions of this Court in *Katz v. United States,* 389 U.S. 347 (1969) and *Henry v. United States,* 361 U.S. 98 (1959), together with opinions of various United States Courts of Appeals in *Kelley v. United States,* 298 F.2d 310 (D.C. Cir. 1961), *Reed v. United States,* 401 F.2d 756 (8th Cir. 1968).

The Court of Appeal rejected the applicability of *Katz* and ignored the other federal decisions.

B. STATEMENT OF FACTS

1. The Prosecution's Case.

Inspector Howard D. Bailey, assigned to the gambling and bookmaking detail of the Bureau of Special Services of the San Francisco Police Department, testified that at approximately 1:00 p.m. on April 13, 1971, after receiving a complaint that alleged bookmaking was taking place at 2455 Polk Street, Apt. 1, San Francisco, Inspector Bailey went through the tradesmen's entrance at the side of the apartment house, down a walkway, of approximately 34 feet, up a flight of 21 stairs, and went to the rear door of Apartment 1, which was located on an upper story. (P.R.T. 3-7; R.T. 2)[1]

When Inspector Bailey was immediately facing the door, standing to the side of the door with his left ear 5″ away from the door, he overheard conversations from the interior. (P.R.T. 7, 17, 26) Inspector Bailey heard a telephone ring twice, two male voices within the interior of the apartment discuss a bet on a California team, and reference to three digit figures followed by an amount of money. Inspector Bailey testified that, on the basis of his experience, he concluded that the conversations related to gambling. (P.R.T. 7-8)

Shortly after the conversations, Inspector Bailey heard one of the occupants leave the apartment, and, thereafter, while remaining outside, he heard the voice of his partner, Edward Johnston, and a voice which

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[1]The reporter's transcript at the preliminary examination will hereinafter be called "P.R.T." and the transcript in the Superior Court proceedings will be called "R.T.".

Inspector Bailey recognized as that of one of the men whom he had heard speaking in the apartment. According to Inspector Bailey, upon hearing the voices, he immediately opened the door to find his partner and immediately informed his partner of the conversations overheard in Apartment No. 1 and that petitioner Betta was one of the conversants. At that point of time, according to Inspector Bailey, his partner placed Mr. Betta under arrest. (P.R.T. 8-9)

Thereafter, Inspector Bailey's partners proceeded to the front door of Apartment 1 and announced that they were police officers on a bookmaking investigation, and demanded entry. Approximately one minute later, Inspector Bailey observed his partners gain forceable entry of the premises. Thereafter he entered the apartment through the rear door that was unlocked. (P.R.T. 9-10)

When he entered the premises, Inspector Bailey observed petitioners Betta and Ng, and a table which contained two black telephone sets, and a paper identified as the "Daily Bulletin and Sports Review", a scratch sheet (People's Exhibit 1) and a sheet of paper which, in Inspector Bailey's opinion, constituted a record of bets. (People's Exhibit 2; P.R.T. 11-12)

On cross-examination, Inspector Bailey admitted that the report which he had prepared immediately upon return to his office made no mention of arresting petitioner Betta in the hallway and described the arrest as follows:

> "After hearing recording of some of the bets heard, R.O. knocked on the door, identified our-

> selves as police officers and stated our reason for demanding entry. Our demands were not complied with so after a reasonable wait, the front door was forceably opened. Both Betta and Ng were placed under arrest and immediately advised of their rights." (P.R.T. 21-22).

A photograph was introduced as Defendants' Exhibit "A", indicating that a kitchen separated the room where the telephones were found and the rear door. (P.R.T. 24-25)

The prosecution next called Inspector David B. Mayer, who was not present during Inspector Bailey's testimony. Inspector Mayer testified on cross-examination that he was deployed outside the front door of the apartment building. When he first observed petitioner Betta, petitioner Betta was coming out the front door of the building. After petitioner Betta opened the front door, Inspectors Johnston and Mayer identified themselves as police officers and indicated they were on a bookmaking investigation. According to Inspector Mayer, petitioner Betta was asked whether he lived in the building, whereupon he answered that he did not, but that he was trying to locate a friend of his who owned the building. Inspector Mayer then asked what apartment petitioner Betta's friend was in, and petitioner Betta stated that the friend did not have an apartment there, but he owned the building, and petitioner Betta was trying to locate him. According to Inspector Mayer, he then asked petitioner Betta how long petitioner Betta was in the building, and petitioner Betta stated approxi-

mately between 10 and 15 minutes. According to Inspector Mayer, he then told petitioner Betta that petitioner Betta was lying, because Inspector Mayer had been outside the building for approximately ½-hour. According to Inspector Mayer, he then asked petitioner Betta to accompany Inspector Johnston and him back to Apartment 1, which defendant Betta did. (P.R.T. 37-38)

The distance between the front door and the foot of the stairs was approximately 22 feet. There were 15 stairs between the street level and the level of Apartment 1. And the distance between the top of the stairs and the door to Apartment 1 was approximately 28 feet. (R.T. 2)

Inspector Mayer further testified on cross-examination that Apartment 1 was not on the street level and that he never saw petitioner Betta leave Apartment 1. (P.R.T. 39) Although Inspector Mayer testified that petitioner Betta accompanied the officers of his own free will, and although he testified that after petitioner Betta asked if he were under arrest Inspector Mayer stated: "No, we are on a bookmaking investigation," Inspector Mayer further testified that at that point if petitioner Betta did not go up of his own free will, Inspector Mayer would have insisted that he accompany the officers back to Apartment 1. (P.R.T. 40)

According to Inspector Mayer, he could not recall if petitioner Betta said anything while preceding the officers. According to Inspector Mayer, Inspector Johnston and he went to Apartment 1 where

Inspector Johnston knocked on the door, and they identified themselves as police officers. After waiting approximately 15 seconds, they kicked the door in. According to Inspector Mayer, petitioner Betta had not been placed under arrest before they knocked at the door and was not placed under arrest until after the telephones and bookmaking paraphernalia were observed. (P.R.T. 41)

Inspector Mayer could not recall whether he had spoken with Inspector Bailey between the time he took petitioner Betta upstairs and the time he entered the apartment. And Inspector Mayer further could not recall which officer had placed petitioner Betta under arrest. (P.R.T. 44-45)

The prosecution then called Inspector Johnston, who although present during Inspector Bailey's testimony, was excluded during Inspector Mayer's testimony. Inspector Johnston testified that he was at the front door when petitioner Betta opened it to exit. After asking petitioner Betta to identify himself, which petitioner Betta did, Inspector Johnston advised petitioner Betta that he was conducting a bookmaking investigation and requested that petitioner Betta accompany him upstairs, which petitioner Betta said he would. According to Inspector Johnston, when they went upstairs, Inspector Bailey related to Inspector Johnston that Inspector Bailey had overheard bets being taken in the premises and that he had heard two voices, one of which he recognized as being petitioner Betta's. Inspector Mayer was beside Inspector Johnston at this time. Inspector

Johnston then immediately placed petitioner Betta under arrest, approximately 30 seconds to a minute before they arrived at the front door of Apartment No. 1 (P.R.T. 47-49)

On cross-examination, Inspector Johnston testified that the officers had been on the scene for 10 to 15 minutes when petitioner Betta came downstairs or outside the front door. (P.R.T. 50) Inspector Johnston could not recall any conversation that had occurred between petitioner Betta and Inspector Mayer at the front door. (P.R.T. 51) According to Inspector Johnston, he had finished his conversation with petitioner Betta approximately mid-way up the stairs. (P.R.T. 52)

2. The Defense Testimony.

At the hearing on the motion to suppress, petitioner Betta testified that he was first confronted by police officers after he had opened the front door to the apartment house. Thereafter, he requested permission to leave, but was told he could not leave. Petitioner Betta testified that after he was stopped by the police officers, he did not believe that he was free to leave the apartment house, and he believed that he was subject to the power of the police officers to control his freedom of movement. (R.T. 5-6)

Petitioner Betta further testified that when the police officers stated to him that he should follow them up the stairway he responded that he did not want to go, whereupon the officers told him to follow them. (R.T. 6)

The petitioner Ng also testified at the hearing and stated that on the date of his arrest the radio had been playing for approximately one hour and one-half before the time of the arrests, and that the radio was on at the time that the police officers entered the premises. (R.T. 14-15)

REASONS FOR GRANTING THE WRIT

I. THE CONCLUSION OF THE CALIFORNIA COURT OF APPEAL THAT PETITIONER BETTA WAS NOT PLACED UNDER ARREST IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

In this case, the evidence indicated that petitioner Betta was accosted by police officers as he was leaving the front door of the apartment house at 2455 Polk Street. After speaking with the officers, petitioner Betta was moved a distance of approximately 22 feet to the foot of the stairs, and then up 15 stairs to the level of Apartment 1, where the alleged bookmaking activity took place. (P.R.T. 37-38; R.T. 2)

One of the police officers testified that although Mr. Betta was formally not placed under arrest as he was leaving the apartment house, if petitioner Betta did not go upstairs of his own free will, Inspector Mayer would have insisted that petitioner accompany the officers back to Apartment 1. (R.T. 2; P.R.T. 40) And petitioner Betta testified that after he was stopped by the police officers he did not believe that he was free to leave the apartment house, and he believed that he was subject to the power of

the police officers to control his freedom of movement. Petitioner Betta further testified that when the police officers stated to him that he should follow them up the stairway, he responded that he did not want to go, whereupon, the police officers told him to follow them. (R.T. 6)

On the basis of these facts, petitioner contended in the Court of Appeal that he was placed under arrest, and that since there was no probable cause to arrest him, all of the evidence acquired thereafter should have been suppressed.

In its answering brief, the respondent conceded that petitioner was placed under arrest, and merely contended that the fact of arrest was irrelevant, since none of the evidence obtained against petitioner Betta was the product of the arrest. (Respondent's Brief, p. 12)

In his reply brief, petitioner Betta contended that it was only through his unlawful arrest that the police officers were able to identify him, since the voice identification allegedly was made by Inspector Bailey after Mr. Betta had been brought to the top of the stairs; whereas, had Mr. Betta been permitted to leave after being questioned, his identity never would have been known.

The Court of Appeal concluded that defendant Betta merely had been subjected to a detention for questioning, and had not been arrested. Not only did this conclusion ignore the concession by the respondent that Mr. Betta was placed under arrest, but ignored the facts that appeared in the record. The

Court of Appeal limited its analysis to what had occurred at the doorway leading to the exterior of the apartment house. The Court ignored the fact that petitioner Betta had been transported approximately 22 feet through the hallway of the apartment house and up 15 stairs before Inspector Bailey identified his voice. These facts were pointed out in the petition for rehearing.

In *Henry v. United States,* 361 U.S. 98, 103, this Court concluded, independent of the government's concession, that a defendant has been placed under arrest when his liberty of movement has been effectively restricted by police officers. This test was followed in *Reed v. United States,* 401 F.2d 756 (8th Cir. 1968). The decisions of this Court in *Terry v. Ohio,* 392 U.S. 1 (1968) and *Sibron v. New York,* 392 U.S. 40 (1968) did not purport to change the *Henry* standard.

The point at which a detention for purposes of investigation or for frisking a suspect becomes an arrest is a critical one indeed. Consequently, this Court should grant certiorari in this case to establish more precise standards to guide state Courts and lower federal Courts in determining when the boundaries of a detention have been exceeded.

II. WHETHER POLICE OFFICERS CAN PLACE THEIR EARS AT THE REAR DOORS OF APARTMENTS IN ORDER TO OVERHEAR CONVERSATIONS EMANATING FROM THE INTERIOR PRESENTS A FEDERAL QUESTION OF SUBSTANCE WITH REGARD TO THE REASONABLE EXPECTATION OF PRIVACY THAT WAS DECIDED NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The evidence in this case disclosed that Inspector Bailey, in the company of other police officers, arrived at 2455 Polk Street in response to a tip from an anonymous informant that bookmaking was occurring in Apartment 1. Upon arriving at the premises, Inspector Bailey went to the side of the apartment house, through the tradesmen's entrance, down 34 feet of walkway, up 21 stairs to the rear door of Apartment No. 1, where he placed his left ear approximately 5 inches from the rear door and overheard one side of a telephone conversation and other conversations from the interior of the premises, which indicated bookmaking activity. It was apparent from the testimony that the petitioners were not speaking in an unusually loud voice, since Inspector Bailey could also hear the telephone ring. (P.R.T. 3-7).

The various United States Courts of Appeal, as well as the California Appellate Courts, that have interpreted *Katz v. United States,* 389 U.S. 347 (1969), with regard to the overhearing of conversations that emanate from the interior of motel rooms or apartment houses have interpreted *Katz* restrictively, in denying defendants' reasonable expectations of privacy. See e.g., *United States v. Llanes,* 398 F.2d 880 (2d Cir. 1968). Cf. *United States v.*

Fuller, 441 F.2d 755 (4th Cir. 1971); *Ponce v. Craven,* 409 F.2d 621 (9th Cir. 1969); *People v. Guerra,* 21 C.A.3d 534, 98 Cal.Rptr. 627 (1971).

It is submitted that when this Court concluded in *Katz v. United States,* 389 U.S. 347 (1969), that a person waives his right to Fourth Amendment protection only by knowingly exposing communications to the public, while retaining this protection with regard to conversations which he seeks to preserve as private, even in an area accessible to the public, this Court certainly intended to cover the circumstances presented herein. For the rationale of the Courts in this case has, of necessity, been that the petitioners could have a reasonable expectation of privacy only by whispering. Yet, that, in the year 1973, a city dweller, living in an apartment house, can have a reasonable expectation of privacy with regard to telephone calls or other conversations which occur within his own apartment, only by huddling in a corner and whispering, is frightening indeed. Moreover, an individual's Fourth Amendment rights should not rise or fall depending upon the acoustical standards of the owners and builders of urban apartment houses.

This Court should grant certiorari to clarify whether *Katz* is to be given a broad application, protecting individuals in their apartments, not only from the prying electronic, but from the prying human ear, as well.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California for the First Appellate District.

Dated, September 14, 1973.

Respectfully submitted,

DAVID B. GOLD,
HERBERT W. YANOWITZ,
Attorneys for Petitioners.

(Appendix Follows)

Fuller, 441 F.2d 755 (4th Cir. 1971); *Ponce v. Craven,* 409 F.2d 621 (9th Cir. 1969); *People v. Guerra,* 21 C.A.3d 534, 98 Cal.Rptr. 627 (1971).

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CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California for the First Appellate District.

Dated, September 14, 1973.

Respectfully submitted,

DAVID B. GOLD,
HERBERT W. YANOWITZ,
Attorneys for Petitioners.

(Appendix Follows)

Appendix "A"

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

---

1 Crim. 10535
(Sup. Ct. No. 80973)

People of the State of California,
Plaintiff and Respondent,

vs.

Robert Eugene Betta and Raymond L. Ng,
Defendants and Appellants.

[Filed March 29, 1973]

The Court:

After the defendants' motions to set aside the information and to suppress the evidence (Pen. Code, §§995, 1538.5) were denied, each defendant entered a plea of guilty to the charge of violating subdivision 2 of section 337a of the Penal Code (bookmaking). The Court sentenced defendant Betta to state prison, but suspended execution of sentence and placed him on probation. The Court suspended im-

position of sentence as to defendant Ng and placed him on probation. Defendants appeal from the judgment and order granting probation, respectively.

Although the information supplied by the anonymous informant did not give the police officers probable cause to arrest the defendants for bookmaking, the officers had cause to investigate the report by going to the apartment building and interviewing suspects and witnesses. (*People v. Martin* (1955) 45 Cal.2d 755, 761.) In conducting an investigation of criminal activity, police officers may, without violating the occupants' reasonable expectation of privacy, peaceably enter the common hallway of an apartment building without a warrant or express permission to do so. (*People v. Terry* (1969) 70 Cal.2d 410, 427, cert. den. 399 U.S. 911.) They may also enter other common areas such as the garage used by apartment tenants (*People v. Terry, supra*) and other areas open to implied invitees such as mailmen, milkmen, trash collectors, and the like (*People v. Bradley* (1969) 1 Cal.3d 80, particularly Justice Tobriner's concurring and dissenting opinion at p. 91). Accordingly, the officers in the instant case did not violate the defendants' expectation of privacy by entering the premises through the unlocked tradesman's entrance and ascending the stairway at the rear of the apartment building.

Even assuming, however, that the officers' entry through the tradesman's entrance constituted a trespass, it has been repeatedly held that the Fourth Amendment forbids unreasonable searches, not tres-

passes, and that a simple trespass without more will not invalidate a subsequent search or seizure. (*People v. Terry, supra; Vickery v. Superior Court* (1970) 10 Cal.App.3d 110, 116; *People v. Seals* (1968) 263 Cal.App.2d 575, 579.)

Relying primarily on *Katz v. United States* (1969) 389 U.S. 347, and *People v. Edwards* (1969) 71 Cal. 2d 1096, the defendants argue that their expectation of privacy was violated when Officer Bailey stood outside the rear door of their apartment and listened to their conversations inside the apartment. Substantially the same argument was made and rejected in two narcotic investigation cases. (*People v. Guerro* (1971) 21 Cal.App.3d 534, hg. den.; *People v. Foster* (1971) 19 Cal.App.3d 649, 653, hg. den.) In *Foster,* we distinguished the *Katz* and *Edwards* cases and said, "The common hallway of an apartment building is not a constitutionally protected area within the purview of *Katz*" (at p. 653). The stairway in this case was similar to a common hallway. Furthermore, since looking through a window and observing bookmaking activity or paraphernalia does not constitute an unreasonable search (*People v. Martin* (1955) 45 Cal.2d 755, 762) or violation of the occupants' right to privacy (*People v. Berutko* (1969) 71 Cal.2d 84, 91), there is no good reason why police officers, while investigating bookmaking activity, should be precluded from listening to conversations while standing in a common hallway or stairway. We conclude that the defendants' expectation of privacy was not violated. The conversations over-

heard by Officer Bailey gave the officers probable cause to arrest the occupants of the apartment for a public offense committed within their presence. (Pen. Code, § 836; cf. *People v. Arnold* (1966) 243 Cal.App. 2d 510; *People v. Aguilar* (1963) 217 Cal.App.2d 260; *People v. Baranko* (1962) 201 Cal.App.2d 189; *People v. Bradley* (1957) 152 Cal.App.2d 527; *People v. Lundy* (1957) 151 Cal.App.2d 244.)

Defendant Betta argues that when the police officers detained him as he was leaving the front entrance of the apartment building he was in effect under arrest, and therefore the subsequent entry of the apartment and the seizure of the evidence was unconstitutional under *Chimel v. California* (1969) 395 U.S. 752, and *Vale v. Louisiana* (1970) 399 U.S. 30. There is little, if any, merit to this argument. The record shows that defendant Betta was merely stopped and detained for questioning by the officers who identified themselves and stated that they were investigating a report of bookmaking. Betta himself testified that the officers did not place him under arrest until after they had entered the apartment. It is well established that facts short of probable cause to make an arrest may justify a temporary detention for purposes of investigating criminal activity (*People v. Mickelson* (1963) 59 Cal.2d 448, 450), provided the officer can point to articulable facts which, taken together with reasonable inferences therefrom, would lead a reasonably prudent man to conclude that investigation was warranted. (*Terry v. Ohio,* 392 U.S. 1.) Here, the officers had

sufficient information and cause to detain Betta for questioning as he left the apartment building. Mere detention at that point did not constitute an arrest since the officers had made no decision whether to take Betta into custody. (Cf. *People v. Superior Court* [*Simon*] (1972) 7 Cal.3d 186, 200.)

The apparent inconsistencies in the testimony as to whether Betta was arrested in the hallway outside the apartment or whether he was arrested after the apartment was forcibly entered is immaterial. The officers clearly had probable cause to arrest Ng, the remaining occupant of the apartment, and when he failed to respond to the officers' demand for entry, pursuant to section 844 of the Penal Code, the officers were justified in breaking open the door.

The incriminating evidence was observed in plain view on a table. Contrary to defendant Betta's assertion, there was no search incidental to his arrest. *Chimel v. California, supra,* does not preclude the seizure of incriminating evidence in plain view. (*People v. Block* (1971) 6 Cal.3d 239, 243.)

The judgment and order appealed from are affirmed.

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

Crim. No. 10535

People of the State of California,
Plaintiff and Respondent,
vs.
Robert Eugene Betta, et al.,
Defendants and Appellants.

[Filed April 23, 1973]

BY THE COURT:

The Petition for a Rehearing filed in the above-entitled cause is hereby denied.

Dated April 23, 1973

Sims, J., Acting P.J.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

June 20, 1973

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 1 Crim. *No.* 10535

People

vs.

Robert Eugene Betta & Ng

Respectfully,
G. E. Bishel
Clerk

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-505

ROBERT EUGENE BETTA and RAYMOND L. NG,
Petitioners,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the State of California, First Appellate District, Division One

OPINION BELOW

The opinion of the Court of Appeal of the State of California for the First Appellate District, certified not to be published in the official reports, is appended to the Petition pp. i-v.

JURISDICTION

The jurisdiction of this Court is conferred by Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether overhearing from an outside stairwell a conversation taking place within an apartment violates the occupants' reasonable expectation of privacy?

2. Whether the temporary detention of a person several minutes to determine if he is involved in specific criminal activity violates the subject's constitutional right to be free from an unreasonable invasion of privacy?

STATEMENT OF THE CASE

On June 18, 1971, the San Francisco District Attorney filed an information in superior court charging petitioners in count one with violation of California Penal Code section 337a(2) (keeping or occupying a place with paraphernalia for the purpose of recording wagers); in count two with violation of California Penal Code section 337a(4) (recording wagers); and in count three with violation of California Penal Code section 337a(6) (accepting wagers). (CT 1-2). On June 30, 1971, petitioners were arraigned on the above charges and entered pleas of not guilty (CT 3). On August 24, 1971. petitioners filed motions under California Penal Code sections 995 and 1538.5 to set aside the information and sup-

press evidence (CT 28). On August 27, 1971, a hearing was held on these motions and the suppression motion was submitted on the basis of the preliminary hearing transcript and additional testimony (CT 32). On September 7, 1971, both motions were denied (CT 34). On that same date petitioners withdrew their former pleas of not guilty and entered pleas of guilty to count one of the information, and counts two and three were dismissed on the district attorney's motion (CT 35).

On October 1, 1971, petitioners were arraigned for judgment. Petitioner Betta was sentenced to state prison for the term prescribed by law, the sentence was suspended and he was placed on probation for a period of three years on the condition that he pay probation costs in the amount of $750 (CT 36). With respect to petitioner Ng, imposition of sentence was suspended and he was placed on two years probation on the condition he pay $500 in probation costs (CT 37).

On October 4, 1971, petitioners filed notices of appeal from the judgments and the order denying their motion to suppress evidence (CT 38; Cal. Pen. Code § 1538.5(m)). On March 29, 1973, the California Court of Appeal affirmed the judgment and the order denying petitioner's motion to suppress evidence (Petition, p. v). On April 23, 1973, the California Court of Appeal denied petitioner's petition for rehearing (Petition, p. vi). On June 20, 1973, the California Supreme Court denied petitioner's petition for hearing (Petition, p. vii). On September 18, 1973, petitioners

filed the present petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

On April 31, 1971, the San Francisco Police Department received a telephone complaint from an unidentified male caller that bookmaking activity was taking place at 2455 Polk Street, apartment 1; that telephone numbers 441-1162 and 441-1168 were those being used for the bookmaking operation; and that a possible suspect was a tall heavy set white male adult (PRT 5, 23-24).[1] Officers Bailey, Johnston, Callagy, and Mayer responded to the Polk Street address at approximately 1 p.m. (PRT 5). Johnston and Mayer stationed themselves in front of the building. Bailey and Callagy went down an alleyway next to the building, through an unlocked door characterized as the tradesmen's entrance and up one flight of a circular stairway to an exposed landing at the rear door of apartment 1 (PRT 8, 16, 23, 47; RT 1, 3, 24-26). The tradesmen's entrance allowed free access from the alleyway to the rear area of the apartment building. It and the stairway appeared to have been designed for tradesmen servicing the building, *i.e.*, public utilities employees such as Pacific Gas and Electric servicemen, garbage men, etc., and for routine deliveries (RT 24-26).

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[1] "PRT" refers to the preliminary hearing transcript of June 9, 1971. "RT" refers to the reporter's transcript of the hearing held on August 27, 1971, pursuant to petitioner's motion to suppress evidence.

Bailey stood approximately five inches from the rear door of apartment 1 and heard two males conducting over the telephone what were in his expert opinion, unlawful bookmaking activities (PRT 7-8, 17). Bailey then heard one of the suspects exit the apartment (PRT 8). Approximately a minute later, Bailey heard the voices of his partner (Johnston) and one of the suspects on the other side of the door opening onto the common hallway (PRT 8, 15). Bailey immediately opened the door and informed Johnston that he had overheard bets being taken in the premises and that Betta was one of the persons he heard in the apartment (PRT 8-9, 47, 54). Johnston promptly placed Betta under arrest (PRT 21, 54). Johnston and Mayer immediately proceeded to the front door of the apartment, knocked and announced their purpose and presence, received no response after a period of approximately one minute, and then forced the door open (PRT 9, 21, 41).

The officers found Ng sitting at a table in the bedroom (PRT 10, 33, 53). On the table were two black telephone sets, a daily bulletin known as a "scratch sheet," and documents reflecting gambling records (PRT 11-12). Bailey recognized Ng's voice as one of those he had heard in the apartment (PRT 27-31). Ng was arrested and both petitioners were advised of their constitutional rights (PRT 32, 35). Thereafter, and in response to Mayer's question why he had left the apartment, Betta stated that "it was the telephone call that didn't sound right . . . and that instead of going downstairs, if he went upstairs

. . . we would not have seen him." (PRT 36-37). While the officers were in the apartment the telephone rang several times, Johnston answered it, and the other parties placed bets with him (PRT 47-48).

The telephone call referred to by Betta apparently was placed by Johnston shortly after the officers arrived at the premises (PRT 37, 49). Approximately one-half hour after the officers arrived at the premises, Johnston and Mayer observed Betta coming out the front door of the apartment building (PRT 38, 47-48). They greeted Betta, identified themselves as police officers, advised Betta that they were making a bookmaking investigation, and asked him if he lived in the building (PRT 38). Betta stated that he did not live there but was looking for a friend who owned the building (PRT 38). When asked how long he had been in the building Betta stated he had been there approximately ten to fifteen minutes (PRT 38). Mayer told him he was lying because Mayer had been outside the building for approximately one-half hour (PRT 38). Mayer then asked Betta, "If he would accompany us back up to apartment No. 1," and Betta stated that he would (PRT 38, 40). When Betta asked if he was under arrest, Mayer replied, "No, we are on a bookmaking investigation." (PRT 40). When Betta and the officers arrived upstairs, Bailey appeared and advised Johnston that Betta was one of the persons he had heard taking wagers inside the apartment (PRT 9, 47, 54). At this point Betta was arrested.

ARGUMENT

I

BETTA'S CONTENTION THAT HE WAS UNLAWFULLY ARRESTED IS NEITHER PROPERLY BEFORE THIS COURT NOR MERITORIOUS

The basis for Betta's arrest was the identification of his voice by Officer Bailey (PRT 54). However, neither at the preliminary hearing, the hearing on the motion to suppress, nor in the first instance in the court of appeal, did Betta ever contend that the voice identification was improper or that evidence of the voice identification should be suppressed.[2] It is well established under California law that failure to raise with particularity the issue presented and the evidence to be suppressed precludes consideration of that issue on appeal. See *People v. O'Brien,* 71 Cal. 2d 394, 401-404, 79 Cal.Rptr. 313, 456 P.2d 969 (1969); *People v. Superior Court,* 274 Cal.App.2d 228, 231-232, 78 Cal.Rptr. 830 (1969); *People v. Rose,* 267 Cal. App.2d 648, 651-652, 73 Cal.Rptr. 349 (1968); see also *People v. Rogers,* 270 Cal.App.2d 705, 707-708 n. 1, 75 Cal.Rptr. 919 (1969); and *Thompson v. Superior Court,* 262 Cal.App.2d 98, 68 Cal.Rptr. 530 (1968). Failure to properly raise the issue at the trial level clearly furnishes an independent and adequate state ground for the opinion of the court of appeal, thereby precluding review here. See *Douglas v. Alabama,* 380 U.S. 415, 422 (1965); *Wolfe v. North Carolina,* 364 U.S. 177 (1960); *Newsom v. Smyth,*

[2]As he admits, this contention was raised for the first time in the court of appeal by way of his reply brief. Pet. 17.

365 U.S. 604 (1961); *Durley v. Mayo,* 351 U.S. 277 (1956); *Edelman v. California,* 344 U.S. 357 (1953); and *Stembridge v. Georgia,* 343 U.S. 541 (1952). Accordingly, as petitioners did not see fit to provide respondent with the opportunity of meeting this issue at the proper level, the contention should be disregarded.

In any event, and assuming the issue properly here, it is of no merit. Viewing the evidence most favorably to the prosecution, as this Court must, the record amply reflects that Betta consented to go with Officer Mayer up to the apartment. See PRT 38, 40. No improper assertion of authority was made which compelled Betta to accompany the officers. *Cf. Bumper v. North Carolina,* 391 U.S. 543 (1968). Rather, the officer's testimony reflects that Betta went "of his own free will" after the officers identified themselves, told him of the reason for their presence, and asked him to accompany them back to the apartment (PRT 38, 40). Although the officers may have required him to accompany them had he refused to do so (PRT 40), they were not confronted with that situation. Accordingly, although the court of appeal did not rely on those facts in its opinion, it certainly was not precluded from doing so and, certainly had that issue been properly put before them, they could have denied relief on this ground also.

Secondly, and as the court of appeal pointed out (Petition, pp. iv-v), the record does not reflect that Betta was arrested when initially confronted by the officers. At that point they had made no decision

whether to take him into custody. However, they did have sufficient information and cause to detain Betta.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. . . ." *Adams v. Williams,* 407 U.S. 143, 145-146 (1972). *Accord, Terry v. Ohio,* 392 U.S. 1, 22 (1968); and *People v. Mickelson,* 59 Cal.2d 448, 450-451, 30 Cal.Rptr. 18, 380 P.2d 658 (1963).

Here, as the court of appeal pointed out, the officers had a more than adequate basis upon which to detain Betta for questioning as he left the apartment building. Consider the following: (1) Betta was observed leaving the apartment building at the time the officers knew unlawful gambling activities were taking place therein. (2) When observed he was only a short distance from the alleged unlawful gambling activities. (3) He was observed leaving the building only one minute after Officer Johnston had telephoned the bookmakers. (4) He denied living in the building and gave the officers a patently false answer in response to their questions after he had been advised that a gambling investigation was underway. Surely such circumstances would have indicated to a reasonable man in a like position that a temporary detention until more information could be obtained was

necessary to the proper discharge of his duties. *Adams v. Williams, supra; People v. Manis,* 268 Cal.App.2d 653, 658-659, 74 Cal.Rptr. 423 (1969). Accordingly, it is submitted that the few seconds it took the officers and Betta to travel the few feet upstairs to the apartment was only a slight restraint on Betta's liberty of movement, and therefore entirely reasonable under the circumstances. *Terry v. Ohio, supra,* 32-33 (1968).

Fourthly, and even assuming Betta's detention unlawful, the voice identification evidence should not have been suppressed. It was not derived by any *exploitation* of that detention. *Wong Sun v. United States,* 371 U.S. 471, 485, 487-488 (1963). See also *Lockridge v. Superior Court,* 3 Cal.3d 166, 170-171, 89 Cal.Rptr. 731, 474 P.2d 683 (1970); and *People v. Johnson,* 70 Cal.2d 541, 546, 75 Cal.Rptr. 401, 450 P.2d 865 (1969). Betta was simply overheard conversing with the officers who had done nothing more than escort him to the suspect apartment. It appears mere coincidence that Officer Bailey overheard Betta's voice in the hallway as they approached.

Finally, the voice identification evidence should not have been suppressed because it was something the officers would have secured regardless of whether they had arrested Betta at the door to the building or not. See *Lockridge v. Superior Court, supra; People v. Stoner,* 65 Cal.2d 595, 602 n. 3, 55 Cal.Rptr. 897, 422 P.2d 585 (1967); *United States v. Seohnlein,* 423 F.2d 1051, 1053 (4th Cir. 1970), *cert. denied,* 399 U.S. 913; *Wayne v. United States,* 318 F.2d 205, 209 (D.C. Cir. 1963); *Somer v. United States,* 138 F.2d 790, 792 (2d

Cir. 1943). See also Annotations, 43 A.L.R.3d 385, 404-406 (1972). Here the officers were aware of Betta's identity when he produced his driver's license at the outset of the preliminary investigation and was recognized by Officer Johnston (PRT 51). That the officers would not have later sought him out had he not been arrested at that particular moment is certainly an unreasonable conclusion. And clearly, that interview would have resulted in his identification as one of the suspects. Accordingly, as this evidence would have been developed regardless of whether Betta was arrested then or later, it is submitted he has suffered no prejudice thereby and therefore the evidence should not be suppressed. *Wong Sun v. United States, supra.*

II

THE OVERHEARING OF PETITIONERS' CONVERSATIONS WITHIN THE APARTMENT DID NOT VIOLATE THEIR REASONABLE EXPECTATION OF PRIVACY

The record reflects that Inspector Bailey stood approximately five inches from the rear door of the apartment and overheard petitioners negotiating gambling transactions. No contention is made by petitioners that the officers were in a place where they were not entitled to be. Nor would such a contention be valid. In this respect, and as we have noted in our statement of facts, *supra,* the record reflects that the area where Bailey was standing appears to have been open to the public. Bailey was standing on the exposed landing of the first floor stairwell on the outside

rear of the building. This landing opened into the first floor hallway, which could be entered simply by opening an unlocked door separating the two. Access to the stairwell and landing was gained by simply walking down an alley, through an unlocked door, and up the stairs. It appears that anyone could approach the premises as properly by this means as by going to the front door. The only possible distinction being that this means of access was less formal and therefore probably was intended for use by employees or other persons providing goods or services to the occupants, as opposed to the formalities accorded invited guests. Certainly, there was no greater expectation of privacy intended with respect to that exposed outside landing than would normally be accorded the common hallway inside.

What petitioners do argue is that their conversations within the apartment were entitled to constitutional protection because they intended those conversations to be private. They rely on *Katz v. United States,* 389 U.S. 347 (1967). However, that reliance is misplaced. As the opinion of the court of appeal points out, it is indeed well established that the overhearing of a conversation under circumstances such as these, just as is the making of observations through open windows from a proper vantage point, does not constitute a search, invade any reasonable expectation of privacy, and is therefore not prohibited by the Fourth Amendment. See *United States v. Wilkes,* 451 F.2d 938, 941, n. 6 (2d Cir. 1971); *United States v. Fuller,* 441 F.2d 755 (4th Cir. 1971);

Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969); *United States v. Llanes,* 398 F.2d 880, 883-884 (2d Cir. 1968); and *United States v. Perry,* 339 F.Supp. 209, 213 (S. D. Cal. 1972), wherein the court commented:

> "The general rule is that information obtained by an officer using his natural senses, where the officer has a right to be where he is, is admissible evidence. The fact that the information is in the form of conversations emanating from a private space, such as a hotel room, is not a bar to its admissibility. [Citation omitted.] Furthermore, the fact that it may be necessary to place one's ear against a door in order to comprehend the conversations inside a room does not make the search unlawful. [Citation omitted.]" See also *People v. Bradley,* 1 Cal.3d 80, 81 Cal.Rptr. 457, 460 P.2d 129 (1969); *People v. Berutko,* 71 Cal 2d 84, 91, 77 Cal.Rptr. 217, 453 P.2d 721 (1969); *People v. Terry,* 70 Cal.2d 410, 427, 77 Cal.Rptr. 460, 454 P.2d 36 (1969), *cert. denied,* 399 U.S. 911; *People v. Martin,* 45 Cal.2d 755, 761-762, 290 P.2d 855 (1955); *People v. Guerra,* 21 Cal. App.3d 534, 538, 98 Cal.Rptr. 627 (1971); *Hart v. Superior Court,* 21 Cal.App.3d 496, 505, 98 Cal. Rptr. 565 (1971); *People v. Foster,* 19 Cal.App. 3d 649, 653, 97 Cal.Rptr. 94 (1971); *People v. Colvin,* 19 Cal.App.3d 14, 20, 96 Cal.Rptr. 397 1971); *People v. Seals,* 263 Cal.App.2d 575, 577, 69 Cal.Rptr. 861 (1968).

Thus, the short answer to petitioners' argument is that regardless of whatever their personal intentions may have been, the fact they spoke loudly and clearly enough to be heard by persons standing outside their

apartment in a place where those persons had a right to be clearly precludes that speech from constitutional protection. It is therefore submitted the police officers properly overheard their unlawful activities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, December 18, 1973.

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